N.D. Peters & Company, Inc. *and* Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 182, AFL–CIO. Case 3–CA–20211

March 19, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND BRAME

On June 4, 1998, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, N.D. Peters & Company, Inc., Utica, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Robert Ellison, Esq., for the General Counsel.
Armond Festine, Esq., of Utica, New York, for the Respondent.
John Amodio, Vice President and Business Agent, Local 182, of Utica, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed by Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 182, AFL–CIO (the Union) on August 1, 1996, and an amended charge filed by the Union on October 3, 1996, a complaint was issued on November 27, 1996, against N.D. Peters & Company, Inc. (Respondent).

The complaint alleges, essentially, that on about April 1, 1996, Respondent unlawfully failed and refused to recall from layoff its employee Charles Piccione (Piccione) because of his union membership and activities and by doing so, it failed to abide by the seniority provision in its expired collective-bargaining agreement. The complaint further alleges that the seniority provision in the contract is a mandatory subject of bargaining, and that by failing to recall Piccione, and by failing to abide by such provision, Respondent did not afford the Union an opportunity to bargain with it concerning such conduct and the effects of such conduct.

The complaint alleges that Respondent's conduct in failing to recall Piccione and in failing to abide by the seniority provision violated Section 8(a)(1), (3), and (5) of the Act.

Respondent's answer denied the material allegations of the complaint, and asserted affirmative defenses that (a) the issue of Piccione's alleged failure to be recalled should be deferred to arbitration and (b) Piccione "voluntarily avoided employment" with Respondent due to his unwillingness to work under the terms and conditions of employment implemented by Respondent pursuant to an impasse in negotiations. On May 28, 1997, a hearing was held before me in Albany, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a New York corporation, having its principal office and place of business at 840 Broad Street, Utica, New York, is engaged in business as a ready-mix concrete supplier.

The complaint alleges that during the past 12 months, Respondent sold and shipped goods and materials valued in excess of $50,000 from its Utica facility to other enterprises directly engaged in interstate commerce. The complaint further alleges that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint also alleges that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent's answer denies knowledge or information sufficient to support a belief as to the truth of the allegations concerning jurisdiction and the labor organization status of the Union.

On August 16, 1996, the Board issued an order in *N.D. Peters & Co.*, 321 NLRB 927 (1996), in which, pursuant to a stipulation of facts submitted by the parties, the Board found that during the 12-month period ending March 19, 1996, Respondent sold and shipped goods and materials valued in excess of $50,000 from its Utica facility to other enterprises directly engaged in interstate commerce, and that Respondent has been an employer engaged in commerce within the meaning of the Act. On July 9, 1996, Respondent filed an RM petition, implicitly asserting that the Board has jurisdiction over it in order to exercise its authority in processing the petition.

The order also found that, pursuant to the parties' stipulation, the Union is a labor organization within the meaning of the Act.

Inasmuch as Respondent has not presented any evidence to contravene its previous stipulations, and since its denial as to jurisdiction was as to knowledge which was specifically within its grasp, I find that no basis exists which would serve to deny the assertion of jurisdiction herein. *Superior Industries International*, 295 NLRB 320, 321 (1989).

With further reference to the Union's status, the complaint alleges and Respondent admits that since about 1975 the Union has been the exclusive collective-bargaining representative of Respondent's unit employees and has been recognized as such by Respondent in successive collective-bargaining agreements.

I accordingly find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge, Member Brame notes that the judge did not determine whether Charles Piccone would have returned to work if he had been recalled by the Respondent.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The collective-bargaining agreement

Since about 1975, the Union has been the exclusive collective-bargaining representative of a unit of Respondent's employees consisting of "all drivers, power-driven concrete block machine operators, concrete block plant mixer men, yardmen, batch men, mill men, truck helpers and mechanics." The Union has been recognized as such representative by Respondent, and they have been parties to successive collective-bargaining agreements, the most recent of which was effective from March 1, 1992, to February 28, 1995.

That collective-bargaining agreement contains a seniority provision, which sets forth, in relevant part:

> A. The principle of seniority shall prevail at all times.
>
> B. . . . Lay-off due to seasonable reasons shall not terminate the employees' seniority.
>
> . . . .
>
> E. An employee who has been laid off shall be given at least three working days to report to the job when he is called back to work, without loss of benefits or rights. In the event the employee fails to report within the specified time, he shall lose any benefits and rights he may have with the employer and a new employee may be hired.

The Respondent and the Union were unable to agree to the terms of a new collective-bargaining agreement at the time it expired on February 28, 1995, but nevertheless continued to bargain after its expiration.

On October 13, 1995, Respondent wrote to the Union, declaring that an impasse existed. The letter noted that, in order to effectively compete with other companies in the industry which "pay substantially less to their employees," it was imperative that wage and benefit levels be reduced.

The letter further advised that Respondent was taking "unilateral action" including (a) freezing wages at current levels; (b) terminating its participation in the Union Health and Hospital Plan, and instead offering Blue Cross, Blue Shield as alternate health coverage, with 50 percent being paid by Respondent only during those periods of time that the employee is actually employed; and (c) not providing further pension benefits.

The letter also stated that "all other contract, terms and conditions to the extent enumerated and/or established by past practice including but not limited to recognition, scope of bargaining unit, grievances and arbitration procedure, etc., to remain the same." Respondent's president, Ralph Ventura, testified that according to that letter, seniority was to remain in effect.

On April 16, 1996, at the start of the 1996 season, Respondent wrote to the Union, in which it advised, inter alia, that "a majority of employees . . . do not desire representation . . . or membership" in the Union, and that it "no longer recognizes" the Union, and that "accordingly, all terms and conditions of the expired collective-bargaining agreement are now moot and future terms and conditions of employment are solely as agreed between employer and employees, subject only to applicable law and regulations."

Thereafter, the Union filed a charge in Case 3–CA–20050, as a result of which a settlement agreement was executed and approved by the Regional Director on July 5, 1996, in which Respondent agreed to recognize the Union. However, there has been no bargaining since that time. As set forth above, on July 9, 1996, Respondent filed an RM petition.

2. The alleged failure to recall Piccione

Piccione became employed by Respondent in June 1986. He worked as a cement mixer driver, a dump truckdriver, and a yardman. Piccione was a member of the Union, and was paid the wages and benefits provided in the contract.

Respondent's business is seasonal, depending upon the extent of construction work available, and weather conditions. Generally, the employees are employed from mid-April to late October. According to the credited testimony of Piccione and Aquilino DeCarolis, a former employee, seniority prevailed in layoffs at the end of the season, and in recalls at the beginning of the season.

Piccione worked the entire season of 1995. He testified that when he was laid off in October 1995, he was told by Respondent's president and sole owner, Ralph Ventura, that he could not afford to pay the Union's pension and benefits any longer. Ventura also told him that if he wanted to continue work, he would have to "drop out of the Union." Ventura further advised that Respondent would pay one half his medical premiums while he was working, but that during his layoff he was responsible for the entire premium. Ventura gave Piccione certain forms to be completed for registration in Managed Physical Network, Inc., its health care provider. Piccione stated that Ventura told him to complete the forms, and return it the next season and that "I would come back to work if I was interested."

Piccione took the forms, but did not complete them and did not return them to Respondent.

Piccione testified that in late March 1996, he called Ventura twice in order to learn when he could report to work for the start of the 1996 season. He asked Ventura whether there was any work yet, and whether Respondent was getting busy. Each time, Ventura said that there was no work, and that he would call when work picks up.

In early April, Piccione visited the shop to purchase some lime, and saw employees Raymond Bronson, Raffaelle Cappelli, and Jose Rivera working in the yard performing the same tasks he did when he was working. Ventura denied that Bronson and Rivera were part of the bargaining unit, but testified that they both did driving work, which was a covered classification in the expired contract. In fact, Rivera had been a member of the Union in 1989 but resigned thereafter. Cappelli did yard work, which Piccione also performed. It should be noted that the contract specifically covers "yardmen."

Shortly after his visit, Piccione called Ventura, asking whether anything was "going on," and telling him that he saw men working, and asked why he was not working. Ventura replied that Respondent was not busy then, and would call Piccione "back as soon as it gets busy."

The parties stipulated that at the beginning of the 1996 season, Piccione was first in seniority, and Ventura testified that he was aware that under the expired contract, seniority was the criteria for layoffs and recalls.

On May 6, Piccione filed a grievance which asserted that as the second highest in seniority, with the number one person, Aquilino DeCarolis, out of work due to an injury, he was improperly not called back to work 2 weeks before, notwithstanding that two nonunion workers, Bronson and Rivera, were working.

On May 13, Respondent's attorney advised the Union that the grievance was received, but was denied since (a) the Union is not recognized as the employee representative; (b) the expired contract is "moot with respect to all terms and conditions, including those pertaining to seniority and grievance procedure"; and (c) there is no agreement between the parties to arbitrate.

On May 13, Piccione began an "informational picket line" advising that employees were working who should not be working.[1] He picketed for about 3 weeks, during working hours, and during which he observed employees Bronson and Rivera working full time, and Cappelli and Burrows working part time. Their tasks included driving concrete trucks, working in the yard, and waiting on customers, duties he had performed.

Respondent has not offered Piccione employment since the time he was laid off in October 1995.

3. Respondent's employment of union members

Respondent employs persons who perform bargaining unit work, but who are not union members, and for whom it does not pay contractual wages and benefits. Thus, there was testimony that Rivera was a union member following his hire in 1989, but resigned from it, and was not thereafter paid union wages or benefits. Rivera was a truckdriver, and also did yard work. Similarly, Bronson and Russell Burrows performed unit work but did not receive union wages or benefits. In fact, their wages were substantially lower than that received by union member Piccione.

Union Vice President and Business Agent John Amodio testified that he has attempted to enforce the contract as to those individuals, but his attempts have been ignored by Respondent. There was evidence that issues concerning those individuals and the Union's funds were litigated at the Board and in other forums, and have been settled.

4. Respondent's defenses

Ventura testified that following the expiration of the collective-bargaining agreement in February 1995, he was forced by economic necessity due to competition with a local ready-mix plant that was nonunion, to propose termination of coverage by the Union's health and pension funds.

Ventura stated that he told Piccione in October 1995, that his wages would remain the same, and Respondent would pay only one half the premium for health coverage while he was working. Ventura denied telling Piccione that he must resign from the Union.

Ventura insisted that he intended to call Piccione back to work for the 1996 season, supporting that contention by noting that he gave Piccione health coverage forms to complete, and asking him to participate in drug and alcohol testing in March 1996, which was given to all employees, and in which Piccione participated.

Ventura noted that Piccione always had called in the past before the start of the season to learn when he could return to work, but that he did not do so before the start of the 1996 season. It is not Respondent's practice to send recall letters or formally recall employees to work.

Based upon Piccione's alleged failure to contact Respondent, Ventura assumed that he did not want to return to work because of the change in the terms and conditions of employment. No direct communication between Piccione and Ventura has been set forth to support Ventura's belief that Piccione did not want to return to work.

Rather, there was testimony of Rivera who stated that at the end of the 1995 season, Piccione told him that he would not return to work if Respondent did not sign the contract, and that he would not work for $10 per hour. Piccione earned the contractual rate of $12.50 per hour at that time. There was also testimony by James Watson, a former employee who visits Respondent's premises often, that Piccione told him on the picket line that he would not work for $9 or $10 per hour and no contract.

Piccione denied both conversations. In any event, there is no evidence that Respondent knew of those alleged conversations at the time they occurred, or when a decision was made by Respondent not to recall Piccione.

Piccione testified that when Ventura told him the conditions of work in October 1995 that would prevail at the start of the 1996 season, he did not want to work under those conditions and did not agree to them, but did not tell Ventura that he objected to such conditions or would not work under such terms. He further testified that he was not going to return to work unless he received the same benefit package he had in the 1995 season, adding that "I guess I made a voluntary choice not to work . . . under the terms and conditions of the impasse."

Nevertheless, Piccione also testified that if he was offered employment at the start of the 1996 season he would have returned to work if the Union told him to do so, adding that the Union did not tell him not to accept employment with Respondent.

5. The employee complement in April 1996

Bronson was the first worker to return to work in the week ending March 23. He worked 40 hours that week, and 4 hours overtime, earning $10 per hour. He again worked 40 hours in the week ending March 30, and 6 hours overtime. In the week ending April 6, he and Rivera each worked 40 hours, with Bronson working 9-1/2 hours overtime, and Rivera working 4 hours overtime. Rivera earned $8 per hour. In the week ending April 13, Bronson and Rivera each worked 40 hours, with Bronson working 8 hours overtime. In the week ending April 20, Bronson and Rivera each worked 40 hours with Bronson working 9 hours overtime. In the week ending April 27, Bronson and Rivera each worked 40 hours, with Bronson working 10 hours overtime. In the week ending May 4, Bronson and Rivera each worked 40 hours, with Bronson working 13 hours overtime. This pattern continued through the end of May, with the addition of Russell Barrows, who returned to work in the week ending May 18, and who worked 8 hours that week, and part time in certain weeks thereafter. Also, a new employee, Harold Crouch, became employed in the week ending June 29, but who had an accident on July 2, and did not return to work until September. Raffaelle Cappelli began work in the week ending July 27, and consistently worked 40 hours per week thereafter.

For the remainder of the 1996 season, Bronson consistently worked full time with overtime hours each week, Rivera worked full time nearly every week, Cappelli worked full time every week, and Watson and Crouch worked part time.

In his affidavit dated in August 27, 1996, Ventura stated that Piccione had not been recalled for the 1996 season because "there is insufficient work to guarantee him full time work." He testified that he could not guarantee anything at the start of the

[1] There was no evidence as to the language of the picket sign.

season as business was slow then. Ventura further stated that he knew that Piccione did not want to work part time, and that Bronson and Rivera have not been working full time.

Respondent's payroll records reveal however, that from the week ending March 23 through September 1996, Bronson worked full time each week, except the week ending July 6, when he worked 32 hours regular time, and 29-1/2 hours overtime.

Ventura stated that although he was aware that the expired contract provided for the application of seniority in recalls, and that he knew that Piccione was first at the start of the 1996 season, he could not guarantee him any work since he did not know what kind of season Respondent would have, and business was slow at the start of the season.

B. Analysis and Discussion

1. The deferral to arbitration

Respondent argues that its alleged failure to recall Piccione should have been deferred to the grievance-arbitration provisions of the expired collective-bargaining contract.

In October 1996, Respondent notified the Board agent that it "has offered to continue the terms of the expired agreement and give Mr. Piccione a forum in which to air his grievance over seniority." Apparently, the Union's attorney rejected the offer, and at hearing, Union Official Amodio denied direct knowledge that such an offer had been made. The contract contains a broad grievance and arbitration clause, defining a grievance as "any controversy, complaint, misunderstanding, or dispute."

The General Counsel argues that deferral is not appropriate. I agree.

Deferral is inappropriate because there is "no contract in existence under which the parties are mutually bound by an agreed-upon grievance-arbitration procedure," and such a contract had not been in existence for more than 1 year at the time of the failure to recall Piccione. *Arizona Portland Cement Co*., 281 NLRB 304 fn. 2 (1986), cited with approval, *August A. Busch & Co.,* 309 NLRB 714, 715 (1992); *Pioneer Press,* 297 NLRB 972, 987 (1990).

In addition, in determining whether to defer to arbitration, the Board will consider whether there is a claim of employer animosity to the employees' exercise of protected rights. *E. I. du Pont & Co*., 293 NLRB 896, 897 (1989). In this case, there is such a claim—that Respondent demanded that Piccione drop out of the Union in order to continue to be employed, and I find, infra, that that claim has merit. *Kenosha Auto Transport Corp.,* 302 NLRB 888 fn. 2 (1991).

I accordingly conclude that deferral to arbitration is not appropriate.

2. The failure to recall Piccione

I credit Piccione's testimony concerning his discussion with Ventura when he was laid off in October 1995. Thus, Ventura told him that he would have to drop out of the Union in order to continue to work for Respondent. This is consistent with Ventura's practice not to pay contractual wages and benefits to certain employees who are performing unit work.

I further credit Piccione's testimony with respect to his calling Ventura in March to learn when to report to work. I cannot credit Ventura's testimony that Piccione did not call him asking to be recalled. Piccione utilized the calling procedure which was used in the past, even according to Ventura, and it was unlikely that Piccione would depart from it this year. Moreover, Piccione's testimony is more believable since he filed a grievance shortly after the start of the season, claiming that he had not been recalled. If Ventura did not believe that Piccione wanted his job back, his grievance, which Respondent received, clearly informed Respondent that Piccione wanted to return to work.

Moreover, the reasons given to Piccione by Ventura when he called in March and April, that Respondent was not busy, and there was no work then, are consistent with Ventura's pretrial affidavit that he did not recall Piccione because business was slow, and there was "insufficient work." Therefore, it is entirely believable that Piccione requested recall in March and April, and was denied recall at those times.

In addition, there is no evidence that Piccione told Ventura that he did not wish to return to work under the new terms and conditions of employment. The fact that he did not return the health forms is not dispositive of the issue. In his grievance protesting the failure to recall him, Piccione did not mention anything about the newly implemented terms.

I cannot credit Ventura's testimony where it conflicted with that of Piccione. Ventura was not a reliable witness. Thus, he denied that Bronson worked full time when the Company's records clearly showed otherwise, and showed not only that Bronson worked full time, but that he worked extensive amounts of overtime hours. Further, his testimony that he could not guarantee Piccione full-time work is not to the point. There was no evidence that Piccione sought such a guarantee—he had worked for the previous 10 years apparently without such a guarantee—and indeed inasmuch as Bronson immediately began working full time at the start of the 1996 season, Piccione, who was first in seniority, could have done so.

It is therefore clear that Ventura did not believe he had to recall Piccione since Respondent had declared an impasse, implemented new terms, and had withdrawn recognition from the Union. Respondent acted at its peril in making those assumptions.

As to Piccione's testimony that he would not have returned to work under the conditions imposed at impasse, I do not believe that that testimony bars him from an offer of recall. Thus, Piccione (a) requested recall in March and April; (b) filed a grievance seeking recall; and (c) participated in drug and alcohol testing prior to the start of the 1996 season, and there is no evidence that Ventura was informed that Piccione would not return to work.

I accordingly find and conclude that Piccione was refused recall because of his union membership, and because Respondent improperly believed that, in ridding itself of the Union it could also rid itself of Piccione. In making these findings, I find that the General Counsel has made a showing that Piccione's union membership was a motivating factor in Respondent's failure to recall him, and that Respondent has not proven that it would have taken the same action even in the absence of his union activities. *Wright Line,* 251 NLRB 1083 (1980).

3. The unilateral change in the seniority provision of the contract

The complaint alleges that Respondent violated Section 8(a)(5) of the Act by failing to abide by the seniority provision of the collective-bargaining agreement, and by not affording the Union an opportunity to bargain with it concerning such conduct and the effects of such conduct.

Seniority is a mandatory subject of collective bargaining. By ignoring the seniority provisions of the expired collective-bargaining agreement, and by refusing to apply them by not recalling Piccione, Respondent unilaterally changed its expired agreement and in so doing violated Section 8(a)(5) of the Act. *L & L Wine & Liquor Corp*., 323 NLRB 848 (1997).

Respondent lawfully implemented its final offer pursuant to an impasse which has not been challenged here. However, the implemented changes "must not be substantially different . . . than that which the employer proposed during negotiations with the Union." *Alachua Nursing Center,* 318 NLRB 1020, 1029 (1995); *Chas. P. Young Houston*, 299 NLRB 958 (1990). Thus, even if a valid impasse was reached, a unilateral change cannot be made unless it is reasonably encompassed within the employer's preimpasse proposal. *Facet Enterprises*, 290 NLRB 152, 178–179 (1988).

Here, the seniority provision remained in effect at all times, and accordingly, Respondent was obligated to apply it even where the contract had expired. By unilaterally failing to apply the seniority provision to the recall of Piccione, and by not affording the Union an opportunity to bargain about that mandatory subject, Respondent violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, N.D. Peters & Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 182, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is appropriate for collective-bargaining purposes:

> All drivers, power-driven concrete block machine operators, concrete block plant mixer men, yardmen, batch men, mill men, truck helpers and mechanics.

4. By failing and refusing to recall from layoff its employee Charles Piccione, Respondent violated Section 8(a)(1) and (3) of the Act.

5. By failing to abide by the seniority provision in its expired collective-bargaining agreement, and by not affording the Union an opportunity to bargain with it concerning that matter, and by failing and refusing to recall Charles Piccione, Respondent violated Section 8(a)(1) and (5) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily refused to recall Charles Piccione, it must offer to recall him, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of his failure to be recalled, April 1, 1996, to the date of a proper offer of recall, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, N.D. Peters & Company, Inc., Utica, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recall from layoff its employee Charles Piccione.

(b) Failing to abide by the seniority provision in its expired collective-bargaining agreement, and not affording the Union an opportunity to bargain with it concerning that matter.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, recall Charles Piccione to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Charles Piccione whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall, and within 3 days thereafter notify the employee in writing that this has been done and that the failure to recall will not be used against him in any way.

(d) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning the seniority provision of its expired collective-bargaining agreement, and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers, power-driven concrete block machine operators, concrete block plant mixer men, yardmen, batch men, mill men, truck helpers and mechanics.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Utica, New York, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility in-

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

volved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to recall you or otherwise discriminate against any of you for supporting Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 182, AFL–CIO or any other union.

WE WILL NOT fail or refuse to recall from layoff our employee Charles Piccione.

WE WILL NOT fail to abide by the seniority provision in our expired collective-bargaining agreement, or not afford the Union an opportunity to bargain with us concerning that matter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, recall Charles Piccione to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Piccione whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful failure to recall Charles Piccione, and within 3 days thereafter notify him in writing that this has been done and that the failure to recall will not be used against him in any way.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning the seniority provision of our expired collective-bargaining agreement, and, if an understanding is reached, embody the understanding in a signed agreement:

> All drivers, power-driven concrete block machine operators, concrete block plant mixer men, yardmen, batch men, mill men, truck helpers and mechanics.

N.D. PETERS & COMPANY, INC.